COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-2904-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

RANDIE ROWELL AND MAPLE CREEK, INC., D/B/A CARLETON HEIGHTS MOBILE HOME PARK,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

ALDRED ASH AND MARION ASH,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Door County: JOHN D. KOEHN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. This appeal arises out of alleged misrepresentations made in connection with the sale of a mobile home park.[1] Randie Rowell and Maple Creek, Inc., d/b/a/ Carleton Heights Mobile Home Park, the buyers, (hereinafter "Rowell") appeal a judgment awarding Rowell $17,500 on a strict responsibility misrepresentation claim against Aldred and Marion Ash, the sellers. Rowell argues that the trial court erroneously struck the jury's damages award on her negligent misrepresentation claim. She also argues that the trial court erroneously denied her claim for punitive damages. We conclude that the trial court erroneously struck the jury's negligent misrepresentation finding. We further conclude that the record supports submission of a punitive damage claim.

The Ashes cross-appeal, contending that there was no misrepresentation as a matter of law; that no credible evidence supported a finding of causation, and that accord and satisfaction precluded claims regarding the well. We reject the Ashes' contentions. Accordingly, we affirm in part, reverse in part and remand for proceedings consistent with this opinion.

Rowell purchased the mobile home park from the Ashes for $335,000. The Ashes had agreed to reduce the price from $350,000 to $335,000 after disclosing a problem with septic system number 3. However, after closing, Rowel learned of additional problems with the wells and septic systems, and brought this suit alleging intentional misrepresentation, strict responsibility misrepresentation and negligent misrepresentation.

At trial, Rowell testified that before the December 7, 1994, closing, she received the seller's real estate condition report. It disclosed nothing about

[1] This is an expedited appeal under RULE 809.17, STATS.

defects in the water or the wells. With respect to septic system number 3, it stated that the sellers were aware of defects, but that they were being taken care of by putting in a reserve bed. No defects were acknowledged with respect to septic system number 6. The offer to purchase contract signed by the sellers warranted and represented that there was no government agency or court order requiring repair, alteration or correction of any existing condition, nor was there any problem with the waste disposal systems and well or unsafe well water according to state standards.

Gus Glaser, a water supply engineer with the Department of Natural Resources, testified that the property is served by two wells: well number 1, which had bacterial contamination, and well number 2, which had lead and copper contamination. In 1993 and 1994, he sent letters to the Ashes advising them of the violations and the need to comply with state regulations. The cause of the contamination was unknown. In 1995, Glaser notified Rowell of sampling requirements and the need for compliance.

John Teichtler, the county sanitarian, testified that in 1988 he sent a letter to the Ashes concerning improper sewerage disposal facilities at the mobile home park. The letter was in reference to septic system number 6. On later inspection, he determined that fill was placed over the system but that it was still failing. The Ashes acknowledged receiving the notice and placing fill over the system. Teichtler notified Ash that fill did not correct the condition. He testified that in 1997, he inspected the system and ordered Rowell to replace the system, which he had ordered the Ashes to replace in 1988. Teichtler testified that the Ashes were not relieved from the prior order to replace the system and that putting fill on it was not acceptable.

Rowell testified that she was not advised that there was an outstanding order to replace a septic system dating back to 1988. She also testified that she was never told that there had been three bacterially positive well water samples in less than two years before she purchased the park, one of the samples indicating fecal coliform. Additionally, in April of 1995 she was first notified through the DNR that there were outstanding orders of noncompliance pertaining to bacteria, lead and copper in the well water.

Rowell testified that as a result, she had to take water samples to Green Bay, first daily, then weekly and then monthly. Rowell testified that Environmental Compliance Corporation invoices for well monitoring and compliance between January 1995 and December 1997 showed expenses of $9,088. She also paid $1,240 for sampling services. Minimum future compliance costs were going to be incurred in the sum of $3,900. In addition, she testified that reimbursement for time and travel to meet with the DNR and other professionals would be $3,176.50. She also incurred 9,594 miles of travel, and $45 in costs to publish notices.

Rowell further testified that the Ashes told her that the water pumps were brand new. The pumps both went out shortly after she purchased the park, and she learned that they were not new, but rebuilt pumps. Replacement costs were $2,733.90 for one pump and $1,203.50 for the other.

Francis Burkel, the plumber who replaced septic system number 6, testified that the cost for the new system to meet minimum code requirements was $45,272.50. In addition, Michael Parent, the plumber who replaced septic system number 3, charged $47,696. Gerald Hintz, Jr., a real estate appraiser, testified that

the value of the park as represented was $334,855 and the value of the park reduced by the defects was $245,000.

At the verdict and instruction conference, the trial court stated that there was insufficient evidence of the Ashes' malice and evil intent and therefore, as a matter of law, denied Rowell's request for punitive damages. The jury was asked to consider strict responsibility misrepresentation with regard to the two septic systems and the well. It concluded that Rowell was entitled to recover benefit of the bargain damages of $17,500 due to misrepresentations as to septic system number 6 and the well.

The jury was next asked to consider negligent misrepresentation with regard to the same two septic systems and the well. It found negligent misrepresentation with respect to septic system number 6 and the well, and awarded Rowell out-of-pocket damages in the sum of $70,000.

On defendants' motions after verdict, the trial court struck the $70,000 award. The court concluded that the plaintiff cannot collect under both a strict responsibility and a negligent theory of misrepresentation. It stated: "While the jury was instructed on a negligent representation theory, plaintiffs had not made any such allegations in their complaint." As a result, the court awarded Rowell judgment for $17,500 plus costs and disbursements.

1. Rowell's appeal

Before we address Rowell's claim of error, we first set out the three bases for a misrepresentation claim and the applicable measures of damage. "[M]isrepresentation is a generic concept separable into the three familiar tort classifications: intent (sometimes called fraudulent misrepresentation, deceit or intentional deceit), negligence and strict responsibility." ***Ollerman v. O'Rourke Co.***, 94 Wis.2d 17, 24, 288 N.W.2d 95, 99 (1980). Intentional misrepresentation exists when the seller makes a misrepresentation of fact that he or she believes to be false or carelessly misrepresents a fact without regard to its truth. ***Vandehey v. City of Appleton***, 146 Wis.2d 411, 414, 437 N.W.2d 550, 551 (Ct. App. 1988). Strict responsibility exists when the misrepresentation is made on the seller's personal knowledge or under circumstances in which he or she necessarily ought to have known the truth or untruth of the statement.[2] ***Id***. Negligent misrepresentation exists when the seller fails to exercise ordinary care in making the misrepresentation or in ascertaining the facts.[3] ***Id***.

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[2] The elements of a claim for strict responsibility for misrepresentation are:

> (1) that the defendant made a representation of fact; (2) that the representation was untrue; (3) that the defendant represented the fact based on his personal knowledge or was so situated that he necessarily ought to have known the truth or untruth of the statement; (4) that the defendant had an economic interest in the transaction; and (5) that the plaintiff believed such representation to be true and relied on it.

D'Huyvetter v. A.O. Smith Harvestore Products, 164 Wis.2d 306, 336, 475 N.W.2d 587, 598 (Ct. App. 1991).

[3] The elements of a claim for negligent misrepresentation are:

> (1) a duty of care or voluntary assumption of a duty on the part of the defendant; (2) a breach of that duty, *i.e.*, failure to exercise ordinary care in making the representation or in ascertaining the

(continued)

Specific damage rules apply to the three categories of misrepresentation. ***Id***. In actions based on either intentional misrepresentation or strict responsibility, the benefit of the bargain measure of damages applies. ***Id***. Traditionally, the benefit of the bargain is measured by the difference between the value of the property as represented and its actual value as purchased. *See* ***Ollerman***, 94 Wis.2d at 52-53, 288 N.W.2d at 112. ***Ollerman***, however, adopted an alternative measure of recovery under the benefit of bargain rule: "Under the benefit of the bargain rule, an alternative measure of recovery is the reasonable cost of placing the property received in the condition in which it was represented to be and the purchaser is not limited to the direct damage." ***Id***. at 53, 288 N.W.2d at 112 (footnote omitted).

In actions based upon negligent misrepresentation, the "out of pocket" rule applies. ***Gyldenvand v. Schroeder***, 90 Wis.2d 690, 698, 280 N.W.2d 235, 239 (1979). Out of pocket loss is defined as "the difference between the market value of the property as it was when purchased and the amount the plaintiff paid for it." ***Id***. at 697-98, 280 N.W.2d at 239. In addition to a recovery of damages under either the loss of bargain or out of pocket rules, the plaintiff may recover consequential or special damages provided they do not duplicate recovery. ***Id***. at 698, 280 N.W.2d at 239.

Rowell argues that the trial court erroneously concluded that her complaint failed to state a claim for negligent misrepresentation. She maintains that credible evidence supports the damages, the parties agreed to submit both

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> facts; (3) a causal link between the conduct and the injury; and (4) actual loss or damage as a result of the injury.

D'Huyvetter, 164 Wis.2d at 331, 475 N.W.2d at 596.

theories of recovery, the court correctly instructed the jury and the amounts awarded were not duplicative. Accordingly, she submits that there is no basis to reduce the damages awarded.

The Ashes argue that Rowell is not entitled to add up the jury's damage awards. They contend that the trial court correctly concluded that had the verdict been phrased in the alternative, the jury would not have answered the questions regarding negligent misrepresentation. In support of their argument, they cite the "Law Note for Trial Judges," in WIS J I—CIVIL 2400, advising that the various theories of misrepresentation should be presented in the alternative, with one damage question. The Ashes concede, however, that "it was agreed in chambers by both parties to give the jury the verdict without the standard alternative approach." The Ashes also note that the trial court "specifically instructed the jury not to include or duplicate in any answer amounts included in any other answer of the verdict."

We conclude that the trial court erred. First, contrary to the trial court's understanding, the complaint expressly alleges negligent misrepresentation, stating: "At the time of the sale of the Trailer Court to the plaintiffs, the defendants knew or should have known of the falseness of the representations and intended to defraud the plaintiffs for the purpose of inducing the plaintiffs to purchase said Trailer Court and/or negligently made said misrepresentations and defendants had an economic interest in the transaction." We conclude that the complaint alleges a claim for negligent misrepresentation.

Second, the parties' agreement to the form of the verdict waives any claim of error based upon a defective verdict. Section 805.13(3), STATS., provides that in order to preserve a claim of error, counsel must object to the proposed

verdict, stating the grounds for objection with particularity on the record. "Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict." ***Id***. Because the parties agreed to submit both theories of misrepresentation, a claim of error based on this alleged defect is waived. ***Gyldenvand***, 90 Wis.2d at 697, 280 N.W.2d at 238.

Third, the record supports $70,000 in damages. When reviewing a damage award, we must consider evidence most favorable to the award, and sustain it if there is any credible evidence to support it. ***Roach v. Keane***, 73 Wis.2d 524, 539, 243 N.W.2d 508, 517 (1976). "A damage verdict would not be disturbed when there is any credible evidence which under any reasonable view supports the jury's finding." ***Hoeft v. Milwaukee & Suburban Transport Corp.***, 42 Wis.2d 699, 716, 168 N.W.2d 134, 142 (1969). The credibility of witnesses and the weight to be given their testimony are left to the jury's judgment, and where more than one inference can be drawn from the evidence, we must accept the inference drawn by the jury. ***Staehler v. Beuthin***, 206 Wis.2d 610, 617-18, 557 N.W.2d 487, 490 (Ct. App. 1996). While a plaintiff may advance alternative theories of recovery in an action, it is axiomatic that there can be only one recovery for a single harm. *See* ***Lambert v. Wrensch***, 135 Wis.2d 105, 129, 399 N.W.2d 369, 380 (1987).

On the claim of negligent misrepresentation, the jury was convinced that Rowell should be compensated $70,000 for her out of pocket expenses. This measure of damages is defined as the difference between the property's market value as it was when purchased and the amount the plaintiff paid for it. ***Gyldenvand***, 90 Wis.2d at 697-98, 280 N.W.2d at 239. The costs associated with monitoring and complying with remedying the well water, as well as the cost of repairing septic system number 6 and consequential damages, totaled

approximately $70,000. The jury could conclude the costs of repair reflected the difference between the market value of the property when purchased and the amount paid for it.

The Ashes respond that we should disregard Rowell's argument for failure to cite legal authority. We disagree. Rowell states ample authority to support her position. The lack of a case precisely on point is not fatal to her contention. The Ashes further argue that Rowell should not be permitted to "add up" her damages.[4] It is axiomatic that double recovery is not permitted. ***Lambert***, 135 Wis.2d at 129, 399 N.W.2d at 380. The Ashes' argument neglects, however, that Rowell made multiple assertions of misrepresentation and that the parties stipulated to the form of the verdict.

Therefore, we reverse the trial court's order that struck the jury's award of $70,000 on the negligent misrepresentation claim. Nevertheless, the record fails to support both an award of $70,000 negligent misrepresentation damages plus $17,500 strict responsibility damages. Also, Rowell fails to explain a rationale for total damages greater than $70,000. Because the jury did not find misrepresentation with respect to the cost to repair septic system number 3, Rowell would not be entitled to damages for the repair of that system. As a result,

[4] In their statement of facts, and without citation to the record, the Ashes contend that "Respondents recently sold the mobile home park for $500,000." We are not sure of the purpose of this statement. We assume the Ashes meant to say that the "*Cross*-Respondents sold" the park. Our review of the record failed to uncover this "fact." The scope of review is necessarily confined to the record before us. ***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979).

Also, the court's time is scarce and "must be applied where needed, not frittered away trying to get at facts that are ready" at hand for the lawyer. ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 819 (7th Cir. 1987); *see also* RULE 809.19(1), STATS. Because this statement is not referenced to the record, we will not consider it on appeal, and remind counsel that violations of the rules of appellate procedure may be sanctioned pursuant to RULE 809.83(2), STATS.

the record supports $17,500 strict responsibility damages plus $52,500 negligent misrepresentation damages, for a total of $70,000. Because the jury attributed to Rowell 20% contributory negligence, her negligent misrepresentation damages must be reduced accordingly.[5]

Next, Rowell argues that the trial court erroneously denied her request to submit to the jury her claim for punitive damages to the jury. The trial court stated that there was insufficient evidence of the Ashes' malice and evil intent and therefore denied Rowell's request for punitive damages as a matter of law.

Section 895.85, STATS., provides in part:

> **(3)** STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

To determine whether the issue of punitive damages should have been submitted to the jury, the appellate court reviews the record de novo. ***Jacque v. Steenberg Homes, Inc.***, 209 Wis.2d 605, 614, 563 N.W.2d 154, 158 (1997). We conclude that the trial court applied the wrong legal standard. The trial court determined that proof of malicious or evil intent was required. Under § 895.85, STATS., however, punitive damages may be awarded if there is evidence of an intentional disregard of the plaintiff's rights. Here, the jury could find that the

[5] Rowell requests that in the event we do not reverse, she is entitled to a new trial in the interest of justice. Because we reverse, we need not address this argument.

Ashes intentionally disregarded Rowell's rights, if it believed that the defects in the septic system or well were intentionally concealed.

The Ashes argue that the evidence was insufficient to infer intentional deceit. We are unpersuaded. It is not necessary for this court to conclude that, had it been the jury, it would have so held that the defendant's conduct satisfied the applicable standard to award punitive damages. "Rather, the question is whether a reasonable jury, acting reasonably, could have so found." ***Brown v. Maxey***, 124 Wis.2d 426, 433, 369 N.W.2d 677, 681 (1985); *see also* ***Durham v. Pekrul***, 104 Wis.2d 339, 348, 311 N.W.2d 615, 619 (1981). Here, the evidence is sufficient to present a jury question as to whether the Ashes intentionally disregarded Rowell's rights.

The Ashes also contend that the court correctly denied Rowell's punitive damage claim because Rowell's intentional misrepresentation claim was not submitted to the jury. We disagree. "[T]he mere fact that the cause of action is based upon negligent conduct does not preclude a punitive damage award if the plaintiff proves the necessary aggravating circumstances beyond ordinary negligence. In such cases, punitive damages are appropriate to punish and deter the wrongdoer, just as they are in cases involving personal torts or products liability." ***Brown***, 124 Wis.2d at 432, 369 N.W.2d at 681. Because the trial court erred in denying Rowell's claim for punitive damages, we conclude that she is entitled to the submission of this claim to a jury. Rowell is entitled therefore to a new trial limited to the issue of punitive damages.

2. The Ashes' cross-appeal

On cross-appeal, the Ashes argue that as a matter of law, there could be no misrepresentation with respect to septic system number 6. They rely on the fact that on December 5, 1994, the plumbing inspector determined that septic system number 6 was not a failing system, and in a January 1995 report, Teichtler verified this opinion based upon his own inspection. They also argue that the legislature repealed the statute under which Teichtler issued the 1988 order. Therefore, they contend that at the time of the closing the order was void.

We are unpersuaded that the Ashes' argument raises issues of law, not of fact. They cite one legal authority, ***Stadler v. Rohm***, 40 Wis.2d 328, 334, 161 N.W.2d 906 (1968), for their proposition that "misrepresentation is not actionable unless it regards a material fact." We conclude that representations regarding septic system number 6 are material to the transaction because the record indicates that the mobile home park cannot operate at capacity if one of its septic systems is failing. A fact is material if a reasonable purchaser would attach importance to its existence or nonexistence in determining the course of action in the transaction in question. ***Ollerman***, 94 Wis.2d at 42, 288 N.W.2d at 107. A reasonable purchaser would attach importance to the existence of a functioning sewerage disposal system.

The Ashes' argument essentially challenges the sufficiency of the evidence to support the verdict. Viewing the evidence in the light most favorable to the verdict, *see* ***Roach***, 73 Wis.2d at 539, 243 N.W.2d at 517, we are satisfied that sufficient evidence supports the verdict. The order is just one basis for Rowell's claim of misrepresentation; even absent the order, the jury could conclude that the system was failing at the time of the closing, contrary to the

Ashes' representation. It is the jury's function, not that of the appellate court, to resolve conflicts in the testimony. When more than one inference can be drawn from the evidence, we must accept the inference drawn by the jury. ***Staehler***, 206 Wis.2d at 617-18, 557 N.W.2d at 490.

Based upon Teichtler's testimony, the jury could have found that the 1995 reports that the system was not failing were inaccurate. Because Teichtler testified that placing fill over the failing system was a quick fix that was not acceptable, the jury could have believed the reports resulted from fill being placed on the system between 1988 and 1994 that merely concealed the effluent but was inadequate to correct the failing system.

Next, the Ashes argue that there was no credible evidence "establishing why septic system number 6 failed." They also argue that there is no credible evidence linking the 1997 failure to any problems occurring in 1988. We conclude that it is the causal link between the conduct and the injury that must be proven, not the cause of the defect. *See* ***D'Huyvetter v. A.O. Smith Harvestore Products***, 164 Wis.2d 306, 331, 475 N.W.2d 587, 596 (Ct. App. 1991). Here, Rowell's testimony permitted the jury's inference that had she known of the defects in sewerage system number 6, she would not have paid $335,000 for the park.

To the extent the Ashes' argument could be interpreted to contend that Rowell failed to provide expert testimony demonstrating that the 1997 septic system failure was existing in 1994 at the time of closing, it must be rejected. The jury was entitled to weigh the evidence and resolve conflicts in the testimony. *See* ***Staehler***, 206 Wis.2d at 617-18, 557 N.W.2d at 490. Because Teichtler, the county sanitarian, testified that placing fill over the failing system was a quick fix

that was not acceptable, the jury could have believed the fill placed on the system between 1988 and 1994 merely covered up the effluent but did not remedy the defect. The jury could infer that the 1997 observed failure had existed prior to 1994 and that the Ashes were aware of it.

Finally, the Ashes argue that accord and satisfaction precluded Rowell's misrepresentation claim with respect to the well. In July 1995, some seven months after the closing and after Rowell was notified of the water contamination, the parties entered into an agreement that provided:

> The ASHES shall be responsible for all costs associated with the testing of said water and shall be responsible for coordinating this testing with the Wisconsin Department of Natural Resources in order to vacate the Department of Natural Resources Notice of Noncompliance. The ASHES shall be responsible for all costs associated with bringing the mobile home court water in compliance with the Department of Natural Resources.

The Ashes do not claim that they complied with this agreement. The record indicates that although the Ashes paid a small amount for some of the water testing, it is essentially undisputed that Rowell was left with the responsibility of approximately $20,000 in well water expenses. The trial court rejected the Ashes' defense of accord and satisfaction as a matter of law. As a result, the issue was not submitted to the jury.

In their four paragraph argument, the Ashes cite generally to just one case, ***Flambeau Products Corp. v. Honeywell Info. Systems***, 116 Wis.2d 95, 341 N.W.2d 655 (1984). This case holds that under the common law, "if a check offered by the debtor as full payment for a disputed claim is cashed by the creditor, the creditor is deemed to have accepted the debtor's conditional offer of

full payment notwithstanding any reservations by the creditor." ***Id***. at 101, 341 N.W.2d at 658.

Here, the Ashes agreed to pay all the costs associated with the monitoring and compliance of well water contamination but did not do so. The payment of less than the full amount of an agreed upon claim does not amount to accord and satisfaction under a long-standing rule relating to consideration for accord and satisfaction. *See* ***id.*** The Ashes do not address or develop this issue, and we will not develop unsupported arguments for them. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995). Because this court declines to address issues raised on appeal that are inadequately briefed, the circuit court's decision on this defense is affirmed. ***State v. Flynn***, 190 Wis.2d 31, 58, 527 N.W.2d 343, 354 (Ct. App. 1994).

We conclude that the court erroneously struck the jury's verdict finding negligent misrepresentation. We conclude that the record supports a total compensatory damage claim of $70,000 ($17,500 strict responsibility misrepresentation damages and $52,500 negligent misrepresentation damages). The negligent misrepresentation award must be adjusted, however, for the 20% contributory negligence attributed to Rowell. We further conclude that the trial court erroneously refused to submit Rowell's claim for punitive damages. As a result, Rowell is entitled to a new trial on the punitive damage question only.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. Costs on appeal to Rowell.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.